Supreme Court, U.S.
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(3)

No. 02-1286

IN THE

Supreme Court of the United States

HOHENBERG BROS. COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Federal Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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17 pp

RULE 29.6 DISCLOSURE

Petitioners incorporate by reference the Rule 29.6 disclosure statement set forth in their Petition for Certiorari in this case.

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ARGUMENT

The government does not dispute that the issues in this case substantially overlap with those in *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002) ("*United States Shoe II*"), because Petitioners in both cases seek interest under 19 U.S.C. § 1505, the Takings Clause, and the Export Clause. However, the government argues that the Court should not hold this Petition pending its ruling in *United States Shoe II*, because Petitioners allegedly have waived their rights to interest. The government's argument is based upon an erroneous reading of the Federal Circuit's opinion and a misinterpretation of the waiver provision in Petitioners' judgments. In any event, the government's waiver argument is a collateral issue that should be addressed by the Federal Circuit on remand if this Court holds, in *United States Shoe II*, that there is a right to interest on HMT refunds.

1. The Federal Circuit did not hold that Petitioners waived rights to interest by executing their stipulated judgments. The Circuit implicitly rejected the government's waiver analysis by issuing a ruling on the merits of Petitioners' interest claims, denying interest under 19 U.S.C. § 1505, the Takings Clause, and the Export Clause. (Pet. App. 11a; *see also* Cert. Opp. at 4 (conceding that the Circuit "determined that petitioners' newly advanced theories for an award of interest lack merit").) There obviously would have been no need for the Circuit to reach the merits of Petitioners' interest claims if the claims had been waived.

The Federal Circuit's opinion does not hold otherwise. In particular, the Federal Circuit did not rule that interest claims were included within Petitioners' waiver of "future claims." (*See* Cert. Opp. at 4-5 (citing Pet. App. 10a).) The *original* claims asserted in Petitioner's complaints sought a refund of

tax principal plus interest. Petitioners' judgments *granted* partial relief on these original claims (by ordering a refund of principal and reserving the question of interest) but waived unrelated collateral claims that Petitioners might otherwise want to assert for the first time in the *future*, following entry of the judgment. For example, Petitioners waived future claims seeking consequential or punitive damages for the government's unconstitutional conduct. (*See* Pet. App. 49a-50a ¶ 9 (waiving damages claims "[u]pon entry of judgment".)[1]

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[1] The language of Petitioners' judgments (including the waiver provision) was promulgated by the CIT in connection with the refund process that followed this Court's ruling in *United States Shoe I*. (*See* Pet. at 3-4.) The CIT solicited draft language for the waiver provision, and in doing so made clear that the waiver was intended to protect the government against claims (such as claims for damages) that were *collateral* to claims for a refund of tax principal:

> THE COURT: . . . The government says they still need some kind of release. I really think the government should be able to get a release of claims that relate to the same payments that are being paid, so that there can't be any *damage* claims or any *collateral* or *contingent* claims coming out of the payments that are made. Nobody has provided me with a draft of such a limited kind of release, but I think the judgment should include that, in that there is some element of stipulation in the judgment.

(Reply App. 2a-3a (emphasis added); *see also* Reply App. 3a-4a (purpose of waiver was to preclude "consequential damage claims" stemming from the payments that the government would be refunding under the judgments).) The waiver of collateral claims did not encompass rights to interest. It is black-letter law that an interest claim is a *part of*, rather than collateral to, a claim for return of principal. *See, e.g., Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 69-70 (2d Cir. 1973) (Friendly, J.) (right to principal and interest is a single indivisible claim); *Wheeler Mach. Co. v. Mountain States Mineral Enter.*, 696 F.2d 787, 789 (10th Cir. 1983) (same).

Accordingly, when the Federal Circuit stated that Petitioners had waived "future claims," it was referring to claims that had nothing to do with Petitioners' claims for interest, which were adjudicated on the merits. (*See* Pet. App. 11a.) Indeed, Customs expressly confirmed in writing, prior to entry of judgment, that the waiver of future claims "exclude[d] interest":

> Upon entry of the judgment, plaintiff releases, waives, and abandons all claims against the defendant, its officers, agents and assigns, arising out of all HMT export payments for the non-severed quarters identified in the HMT Payment Report and Certification form, including, but not limited to, all claims for costs, attorney fees, expenses, compensatory damages, and exemplary damages, *excluding interest.*

(Reply App. 5a-6a (emphasis added).)

2. Even if the government's waiver analysis were entirely correct, Petitioners would not be foreclosed from receiving interest if this Court awards interest in *United States Shoe II.* The government does not assert that Petitioners have waived *all* rights to interest and agrees that Petitioners are entitled to interest if interest is awarded in the *IBM* case. (Cert. Opp. at 5.) A ruling for the taxpayer in *United States Shoe II* should lead to an interest award in *IBM*, because both cases address the same question – whether interest is owing on HMT refunds. Under those circumstances, even the government's analysis establishes that Petitioners would be entitled to interest. (*Id.*)[2]

---

[2] The government is wrong when it suggests that the taxpayer in *IBM* is currently foreclosed from receiving an award of interest. (Cert. Opp. at 3

(Footnote cont'd on next page)

3. Finally, this Court should not adjudicate the merits of the waiver question in connection with the Petition for Certiorari in this case even if the government had raised a colorable waiver argument. Adjudicating the waiver question would require analyzing the record materials and divining the intent of the parties at the time they executed their stipulated judgments. This Court should not make that determination in a ruling on a Petition for Certiorari. The proper course is for the Court to hold the Petition pending its disposition of the Petition for Certiorari in *United States Shoe II*, vacate the judgment, and remand this case to the Federal Circuit for that court to address any waiver question.

CONCLUSION

The Court should hold the Petition in this case pending disposition of *United States Shoe II* and then grant the Petition, vacate the Federal Circuit's judgment, and remand this case to the Circuit for further proceedings consistent with *United States Shoe II*.

(Footnote cont'd from previous page.)

& n.1.) The Federal Circuit recently issued its opinion in the second *IBM* appeal. *IBM Corp. v. United States*, No. 02-1356, 2003 U.S. App. LEXIS 5396 (Fed. Cir. Mar. 19, 2003) ("*IBM II*"). In *IBM II*, the Circuit denied interest by relying on *United States Shoe II;* the two cases therefore present many of the same substantive issues. We are informed that a Petition for Certiorari in *IBM II* will soon be filed in this Court. If the Court holds the *IBM II* Petition pending its ruling in *United States Shoe II* and then awards interest in *United States Shoe II*, IBM also should receive an award of interest.

Respectfully submitted,

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May 5, 2003

REPLY APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
COURT OF INTERNATIONAL TRADE

UNITED STATES SHOE CORP.

Plaintiff

v.

Court No.
94-11-00668

UNITED STATES,

Defendant.

One Federal Plaza
New York, New York

August 20, 1998
11:00 a.m.

BEFORE: THE HONORABLE JANE A. RESTANI

APPEARANCES:

On behalf of Plaintiff:

SIEGEL MANDEL & DAVIDSON
BY: PAUL HOROWITZ

COUDERT BROTHERS
BY: MR. BECKER

LUMPFORD PAGE HALL, ESQ.

CAT & NUCHIN
BY: MICHAEL ROLL, ESQ.

BAKER McKENZIE
BY: MICHAEL CONE, ESQ.

KEVIN HORGAN, ESQ.

LAMB & LURCH
BY: SIDNEY KUFLICK

BARNES, RICHARDSON & COLBURN
BY: JAMES O. KELLEY

STEVE SOZNOFF, ESQ.

BURKE & MEYER
BY: JAMES BURKE, ESQ.

PATRICK GILL, ESQ.
RODEY & QUAILEY

On behalf of Defendant:

JEANNE E. DAVIDSON, ESQ.

TODD M. HUGHES, ESQ.

LARA LEVINSON, ESQ.

* * * *

THE COURT: Okay. Oh, release, I forgot to mention that. The government says they still need some kind of release. I really think the government should be able to get a release of claims that relate to the same payments that

are being paid, so that there can't be any damage claims or any collateral or contingent claims coming out of the payments that are made. Nobody has provided me with a draft of such a limited kind of release, but I think the judgment should include that, in that there is some element of stipulation in the judgment.

Do you have any problem with that?

MR. BECKER: No. I don't, your Honor.

THE COURT: Okay. So kind of limited release, okay.

* * * *

MR. BECKER: Might the Court consider a submission by the steering committee of a proposed release form?

THE COURT: Yes. Show it to Ms. Davidson.

MS. DAVIDSON: Right, yes, we could talk about it.

THE COURT: I want you to work on some kind of narrow ---

MS. DAVIDSON: We could talk about it. The language we submitted we use all the time, and I've used it in 592 cases.

THE COURT: They're right. They shouldn't have damage claims stemming from the payments. We're settling the payments, that's it. If you want your payment, you know, those aren't real claims. I don't want people giving up real claims. Those are the claims, the older claims, and claims for imports or whatever other stuff.

MS. DAVIDSON: For those payments.

THE COURT: For those payments; there shouldn't be consequential damage claims remaining for those

payments. If you want those payments, you get those payments.

* * * *

APPENDIX B

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
INDIANAPOLIS, INDIANA

December 10, 1998

FILE: FIS-5-22-0F-AS:AR DT

Honenberg Bros. Company
McKenna & Cuneo, LLP
Att: HMT
1900 K Street, NW
Washington, DC 20006-0000

We are sending your Harbor Maintenance Tax (HMT) Payment Report and Certification form, which lists the HMT payments, within the two-year statute of limitations period, that Customs has identified from its database. Please verify that the plaintiff paid the payments listed on the form.

If you are satisfied with the payments listed on the HMT Payment Report and Certification, please sign the form certifying to the best of your knowledge and belief that the plaintiff paid the HMT payments listed in number three and are entitled to a refund of those payments as listed in number five. You must complete a judgment form with the HMT Payment Report and Certification form attached and submit it to the Department of Justice at the following address:

Department of Justice
Attention: Doris Lucas, Room 11041
1100 L Street, NW
Washington, DC 20530

Upon entry of the judgment, plaintiff releases, waives, and abandons all claims against the defendant, its officers, agents

and assigns, arising out of all HMT export payments for the non-severed quarters identified in the HMT Payment Report and Certification form, including, but not limited to, all claims for costs, attorney fees, expenses, compensatory damages, and exemplary damages, excluding interest. Defendant releases, waives, and abandons all claims, other than fraud, that it may have against plaintiff, or its officers, agents, or employees arising out of all HMT export payments for the non-severed quarters identified in the attached HMT Payment Report and Certification form.

If you dispute the completeness and accuracy of the payments listed on the HMT Payment Report and Certification form, please provide supporting documentation for the different or additional payments along with a point of contact name and phone number to Customs at the following address:

U.S. Customs Service
HMT Refunds
P.O. Box 68940
Indianapolis, IN 46268

or

U.S. Customs Service
HMT Refunds
Suite 750
7920 Georgetown Road
Indianapolis, IN 46268

Customs will then research paper records in an attempt to resolve the dispute. A new HMT Payment Report and Certification form will be returned to you within sixty days. If the revised certification is satisfactory, you must certify the information, complete a judgment form, and submit both to the Department of Justice at the address provided in this letter. If you continue to dispute the payments on the new HMT Payment Report and Certification form, please contact the Department of Justice, in writing, at the address provided in this letter. Any dispute that cannot be resolved will be submitted to the Court of International Trade for resolution.

Sincerely
/s/
Thomas A. Smith
Director
Accounting Services Division

Attachments